87-880

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1987

GENERAL ELECTRIC COMPANY,

Petitioner,

—against—

M/V "NEDLLOYD ROUEN"

—and against—

NEDLLOYD LIJNEN B.V. (NEDLLOYD LINES),

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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STATEMENT REQUIRED BY SUPREME COURT RULE 28.1

Respondent Nedlloyd Lijnen B.V. (Nedlloyd Lines) is a wholly owned subsidiary and division of Royal Nedlloyd Group N.V. Other divisions of the Royal Nedlloyd Group N.V., which are affiliates of Respondent Nedlloyd Lijnen B.V. are:

Nedlloyd Bulk
Neddrill
Mammoet Transport
Nedlloyd Fleet Services
Damco International Transport
Transavia
Nedlloyd Energy

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RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Respondent, Nedlloyd Lijnen B.V. (hereinafter "respondent" or "Nedlloyd") respectfully requests that this Court deny the Petition for a Writ of Certiorari seeking to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The order of the United States Court of Appeals for the Second Circuit dated July 30, 1987 denying the Petition for a Rehearing with a Suggestion for Hearing *En Banc* is reproduced at Appendix A page 30a to the Petition. The opinion of the United States Court of Appeals for the Second Circuit affirming the judgment of the United States District Court for the Southern District of New York in favor of respondent Nedlloyd is reproduced at Appendix A pages 16a-29a to the Petition. That opinion is officially reported at 817 F.2d 1022

(2d Cir. 1987).[1] The opinion of the United States District Court for the Southern District of New York is reproduced at Appendix B pages 32a-40a to the Petition. That opinion is officially reported at 618 F. Supp. 62 (S.D.N.Y. 1985).

STATEMENT OF THE CASE

In February 1983, petitioner, General Electric Company, (hereinafter "petitioner" or "G.E.") as shipper and consignee, contracted with Nedlloyd, as vessel-owning ocean carrier, for the carriage of 26 items of cargo from Portsmouth, Virginia to Yenbu, Saudi Arabia. Two items were discharged damaged in Saudi Arabia. As a result, G.E. brought this maritime action in the United States District Court for the Southern District of New York to recover damages for breach of contract.

The District Court granted Nedlloyd's motion for partial summary judgment to limit its liability to $500 per package or customary freight unit pursuant to the United States Carriage of Goods by Sea Act, 46 U.S.C. § 1304(5) (West 1975) ("COGSA"). The District Court held Nedlloyd liable for damage to G.E.'s cargo in the amount of $28,500. G.E. appealed the District Court's ruling in favor of respondent Nedlloyd that Nedlloyd's *ad valorem* freight rate was reasonable and that its bill of lading provided adequate notice of the COGSA limitation of liability. The Court of Appeals affirmed the judgment of the District Court.

The Court of Appeals examined the contract of carriage between the parties expressed in the bill of lading. The Court of Appeals stated that petitioner's attacks on whether Nedlloyd's bill of lading provided adequate notice had already been held meritless in *Binladen BSB Landscaping v. M/V*

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1 The decision of the Court of Appeals for the Second Circuit was issued on May 6, 1987. Pursuant to a court order dated July 23, 1987, the Second Circuit issued an "errata" making minor modifications to its original opinion.

NEDLLOYD ROTTERDAM, 759 F.2d 1006, 1017 n.12 (2d Cir. 1985), *cert. denied*, 474 U.S. 902 (1985). Citing *Binladen*, the Court of Appeals stated that the language on the back of Nedlloyd's bill of lading incorporating COGSA and the space on the front for declaring excess value provided adequate notice of the COGSA limitation of liability and the means of avoiding it. Appendix A to Petition at 29a.

The Court of Appeals dismissed G.E.'s argument that Nedlloyd's *ad valorem* freight rate was unreasonable. The Court of Appeals noted that petitioner "never even inquired about making such a declaration, much less took steps towards actually declaring the value of its cargo." Appendix A to Petition at 28a. The court concluded that the lack of evidence with respect to G.E.'s investigation of Nedlloyd's *ad valorem* freight rate strongly suggested that G.E. made a business judgment not to explore the possibility of obtaining greater protection at a higher rate and that "the alleged excessiveness of Nedlloyd's *ad valorem* charge played no part in denying GE a fair opportunity to declare value." *Id.*

REASONS FOR DENYING THE WRIT

This case does not present the "special and important reasons" for this Court's review on Writ of Certiorari that are required by Supreme Court Rule 17.1. The decisions of the courts below are correct on the facts and on the law. The cases relied on by petitioner in order to suggest a conflict in decisions of the Circuit Courts of Appeal simply do not apply.

The United States Carriage of Goods by Sea Act, 46 U.S.C.A. § 1300 *et seq.* (West 1975) ("COGSA") limits an ocean carrier's liability for loss or damage to goods to $500 per package or customary freight unit "unless the nature and value of the goods have been declared by the shipper before shipment and inserted in the bill of lading." *Id.* at § 1304(5). Although not contained in COGSA, common law principles

provide that the carrier allow the shipper a "fair opportunity" to declare a value in excess of the $500 figure.

If a shipper opts to declare a value greater than $500, respondent Nedlloyd charges a ten percent *ad valorem* freight rate in exchange for waiving its limited liability. This *ad valorem* rate is published in respondent's tariff on file with the Federal Maritime Commission. Petitioner contends that respondent's *ad valorem* rate was unreasonable and effectively deprived it of a fair opportunity to declare a value greater than $500.

In its opinion below the United States Court of Appeals for the Second Circuit stated that consideration of "fair opportunity" requires analysis of two elements: first, whether or not the shipper received adequate notice of its right to declare a higher value; and second, the reasonableness of the carrier's *ad valorem* charge if the shipper decides to exercise that right. Appendix A to Petition at 27a. In its effort to comply with Supreme Court Rule 17 by alleging a conflict of decisions in the Circuit Courts of Appeal, petitioner cites a number of decisions all of which deal with the adequacy of notice. *See* Petition at 10-11 and cases cited therein. Petitioner, however, concedes in its pleadings to this Court that it had adequate notice. Petition at 28. Petitioner states: "[t]he carrier's tariff was filed with the U.S. Government, as required by law, and thus gave constructive notice to G.E." *Id.* Petitioner then advises that its "argument has never been that it did not know or should not have been charged with knowledge of NEDLLOYD's rate for declaring a value," but that even with knowledge respondent's *ad valorem* charge was unreasonable. *Id.*

In addition to conceding that it had constructive notice, petitioner has previously conceded that it also had actual notice. In its Petition for Rehearing with a Suggestion for Rehearing *En Banc*, petitioner stated at page 9: "[w]e agree with the Court's conclusion that G.E. obviously knew it could have declared a higher value. . . ."

Petitioner's concessions that it knew it could declare a higher value remove the adequacy of notice as an issue from this case. Consequently, the cases relied on by petitioner in support of the purported conflict, all focusing on the adequacy of notice, are simply not material to the specific issue that petitioner unsuccessfully presented below and now attempts to reargue to this Court: the alleged unreasonableness of respondent's *ad valorem* rate. However, even assuming, *arguendo*, that notice is still an issue, the purported conflict is illusory because the cases petitioner relies on are clearly factually distinguishable from one another and from this case.

Petitioner contends that the Second, Fourth, Fifth and Ninth Circuits have reached differing results in "fair opportunity" cases. *General Electric Co. v. M/V NEDLLOYD ROUEN*, 814 F.2d 1022 (2d Cir. 1987); *Cincinnati Milacron, Ltd. v. M/V AMERICAN LEGEND*, 804 F.2d 837 (4th Cir. 1986) (*en banc*) (*per curiam*); *Wuerttembergische v. M/V STUTTGART EXPRESS*, 711 F.2d 621 (5th Cir. 1981) (*per curiam*); *Brown & Root, Inc. v. M/V PEISANDER*, 648 F.2d 415 (5th Cir. 1981); *Nemeth v. General S.S. Corp.*, 694 F.2d 609 (9th Cir. 1982); *Komatsu, Ltd. v. States S.S. Co.*, 674 F.2d 806 (9th Cir. 1982); *Pan Am. World Airways v. California Stevedore & Ballast Co.*, 559 F.2d 1173 (9th Cir. 1977) (*per curiam*).

Petitioner incorrectly states that the Ninth Circuit "requires the bill of lading to recite the language of COGSA § 1304(5) so that a shipper will know that it can declare a value higher than $500 per package or customary freight unit." Petition at 10. The Ninth Circuit has merely stated that "an express recitation of [COGSA] section 4(5) is *prima facie* evidence that the shipper was given a fair opportunity to choose a higher liability." *Nemeth v. General S.S. Corp., Ltd.*, 694 F.2d 609, 611 (2d Cir. 1982); *see also Komatsu, Ltd. v. States S.S., Co.*, 674 F.2d 806 (9th Cir. 1982); *Pan Am World Airways v. California Stevedore and Ballast Co.*, 559 F.2d 1173 (9th Cir. 1977) (*per curiam*). The Ninth Circuit did not state, however, that the carrier could not prove that the shipper had notice

through other evidence. Therefore, the carrier could prove, for example, that the shipper had actual notice of its option to declare a higher value and elected not to do so.

Further, in both *Nemeth* and *Pan Am*, the Ninth Circuit found the fact that the bills of lading at issue contained no designated place for declaring an excess value was "relevant to the inquiry of whether there was a fair opportunity to choose between a higher or lower liability." *Nemeth*, 694 F.2d at 612 *citing Pan Am*, 559 F.2d at 1175. As observed by the District Court in this case, however, respondent's bill of lading "clearly contained a space entitled 'excess valuation' within which [petitioner] could have inserted a declaration of value." Appendix B to Petition at 35a. Consequently, based on the factual scenario at issue in this case, the Ninth Circuit could have reached precisely the same conclusion as the Second Circuit. Finally, the Ninth Circuit has recognized that these cases tend to be factually intensive as each bill of lading and tariff at issue contains different terms and conditions. *Komatsu, Ltd. v. States S.S. Co.*, 674 F.2d 806, 811 n.7 (9th Cir. 1982). It has reserved judgment as to whether a shipper would have adequate notice if the bill of lading or the tariff alerted the shipper to COGSA's $500 package limitation. *Id.*

In *Wuerttembergische v. M/V STUTTGART EXPRESS*, 711 F.2d 621 (5th Cir. 1983) (*per curiam*) and *Brown & Root, Inc. v. M/V PEISANDER*, 648 F.2d 415 (5th Cir. 1981) the Fifth Circuit also considered the adequacy of notice to the shipper of its option to declare a higher value. Although the Fifth Circuit differed slightly from the Ninth as to the effect of a bill of lading's incorporation of COGSA by reference, the "key conclusion" reached by the Fifth Circuit in both cases was "that the published tariff of the carrier is law and is controlling." *Wuerttembergische*, 711 F.2d at 622; *Brown & Root*, 648 F.2d at 425. In both cases the Fifth Circuit held that the "carrier proved (by the tariff) the availability of choice of valuation." *Brown & Root*, 648 F.2d at 425. In both cases the Fifth Circuit also noted that the tariffs at issue were quite specific. As noted above, the Ninth Circuit has reserved judg-

ment as to whether a shipper would receive adequate notice if either the bill of lading or the tariff alerted the shipper to the package limitation. *Komatsu, Ltd. v. States S.S. Co.*, 674 F.2d 806, 811 n.7 (9th Cir. 1982). Therefore, if the reference to the package limitation in either a bill of lading or a tariff was "sufficiently explicit to make a shipper aware that a package limitation exists . . . ," the Ninth Circuit could concur with the Fifth. *Id.* at 811.

The Fourth Circuit has recently held, *en banc*, in *Cincinnati Milacron, Ltd. v. M/V AMERICAN LEGEND*, 804 F.2d 837 (4th Cir. 1986) (*en banc*) (*per curiam*), that a shipper received adequate notice, and therefore "fair opportunity," from the carrier's short form bill of lading which incorporated its long form bill of lading by reference, which in turn contained the applicable provisions of COGSA.

In its opinion below the Second Circuit accurately stated as to the adequacy of notice issue that "[*p*]*rima facie* evidence of [fair] opportunity is established when it can be gleaned from the language contained in the bill of lading." Appendix A to Petition at 29a. The Second Circuit then held, relying on its earlier decision in *Binladen BSB Landscaping v. M/V NEDLLOYD ROTTERDAM*, 759 F.2d 1006, 1017 n.12 (2d Cir. 1985), *cert. denied*, 474 U.S. 902 (1985), construing the identical bill of lading at issue before this Court, that "the language on the back of the Nedlloyd document incorporating COGSA's provisions and the space for declaring excess value on the front are sufficient notice of the limitation and the means of avoiding it." Appendix A to Petition at 29a.

These appellate court opinions are all based on unique and differing factual circumstances. The result in each flows primarily from the differing terms and conditions contained in the bills of lading and tariffs at issue. Consequently, even assuming *arguendo* that adequacy of notice remains an issue in this case, the alleged circuit court conflict concerning precisely what will adequately notify a shipper of its option to declare a

higher value is illusory because the cases turn on their specific facts.

As noted above, since petitioner has conceded that it had both actual and constructive notice, these cases simply have no bearing on the specific issue petitioner raises: the reasonableness of respondent's *ad valorem* freight rate. No conflict exists among the circuits as to this issue.

It is doubtful that the reasonableness of one ocean carrier's *ad valorem* freight rate is of sufficient moment to warrant consideration by this Court. As stated by Lord Diplock of the House of Lords, "[t]he option to declare a higher value is practically never exercised." *Mitsui & Co., Ltd. v. American Export Lines, Inc.*, 636 F.2d 807, 815-816 n. 9 (2d Cir. 1981) *quoting* L.J.K. Diplock, *Conventions and Moral Limitations Clauses in International Maritime Conventions*, 1 Journal of Maritime Law and Commerce 524, 529 (1970). Therefore, the issue of the reasonableness of a carrier's *ad valorem* freight rate simply never arises.

The Second Circuit has noted that "one obvious reason" that shippers never declare a higher value is that all risks marine insurance provides a shipper or consignee with much more comprehensive coverage than that provided by declaring a higher value. This is because in the latter case the carrier retains all of its COGSA defenses to liability contained in 46 U.S.C. § 1304(2). *Mitsui*, 636 F.2d at 815-816, n.6. As observed by the Second Circuit:

> "declaration of value and payment of higher *ad valorem* rates benefits the shipper or consignee only when the carrier is liable. Shippers, consignees and persons financing maritime transactions insist on insurance that will protect against all risks of shipment including loss or damage attributable to such causes as acts of the crew, fire, and perils of the sea, not just those risks for which recovery maybe had under COGSA."

Id.; *see also Berisford Metals Corp. v. S/S SALVADOR*, 1986 A.M.C. 99, 101 (S.D.N.Y. 1985) (not otherwise reported) (noting declaration of a higher value is very rare because "[i]t is apparently far cheaper to obtain insurance for the shipment which would be necessary in any event and not to declare the excess value."); *see generally* G. Gilmore & C.L. Black, Jr., *The Law of Admiralty* § 3-47 (2d ed. 1975).

In this case petitioner had purchased and was covered by an all risks marine insurance policy in connection with the ocean carriage of its cargo. Joint App. in 2d Cir. at 394-416. Indeed, the District Court noted that petitioner had never declared the excess value of any of its cargoes in order to avoid the COGSA limitation in the 43 years of one employee's experience with petitioner.

Even if this Court were to conclude that the reasonableness of one ocean carrier's *ad valorem* freight rate was of sufficient importance to warrant its consideration, this would not be the appropriate case for that consideration. As indicated by the Second Circuit, petitioner "never even inquired about making such a declaration, much less took steps towards actually declaring the value of its cargo." Appendix A to Petition at 28a. The Second Circuit concluded that petitioner was therefore estopped from arguing that Nedlloyd's *ad valorem* freight rate was excessive. *Id.* The court stated: "[a]s an experienced shipper, GE obviously knew that it could declare a higher value. The lack of evidence with respect to GE's investigation of Nedlloyd's *ad valorem* charge strongly suggests that '[t]hey made a business judgment . . . not to explore the possibility of obtaining greater protection . . . at [a] higher rate.' " *Id. quoting First Pennsylvania Bank N.A. v. Eastern Airlines Inc.*, 731 F.2d 1113, 1122 (3d Cir. 1984). The court further concluded that "the alleged excessiveness of Nedlloyd's *ad valorem* charge played no part in denying GE a fair opportunity to declare value. Instead, it was GE's own cost benefit analysis that prevented it from taking such a step." Appendix A to Petition at 28a-29a. Nedlloyd's *ad valorem* freight rate could have been one tenth of one percent, ten percent, or greater, and

it simply would not have made any difference whatsoever to petitioner's decision to enjoy the benefit of ocean carriage at a reduced freight rate in consideration of allowing Nedlloyd to limit its liability pursuant to § 1304(5) of COGSA.

CONCLUSION

The issue of the adequacy of notice is not before this Court as petitioner has conceded that it had both actual and constructive notice. There is no conflict in the circuits as to the reasonableness of an ocean carrier's *ad valorem* freight rate. Further, the reasonableness of one ocean carrier's *ad valorem* freight rate does present the "special and important reasons" for this Court's review required by Supreme Court Rule 17.1. To the extent that petitioner's other questions and/or arguments have not been addressed by respondent, they do not present questions sufficient to invoke the jurisdiction of this Court pursuant Supreme Court Rule 17.1.

For the foregoing reasons, respondent respectfully submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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